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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-744

EDWARD J. BENNETT,
APPELLANT,

v.

MELDRIM THOMSON, JR. ET AL.,
RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

Jurisdictional Statement.

KIMON S. ZACHOS,
JAMES E. HIGGINS,
MICHAEL C. HARVELL,
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N,
1000 Elm Street,
Manchester, New Hampshire 03101.
(603) 668-0300

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

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Jurisdictional Statement.

Opinion.

The opinion of the Supreme Court of New Hampshire is reported at N.H. , 363 A. 2d 187 (1976), and appears herein as Appendix C.

Jurisdiction.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of N.H. R.S.A. 4:1 (1970) *infra*, p. 3, on the ground that, as applied by Respondents herein, that section violates the First and Fourteenth Amendments to the Constitution of the United States.

On June 26, 1974, Respondents, the Governor of the State of New Hampshire and the duly constituted Executive Council of the State of New Hampshire, appointed the Appellant as Director of the Division of Economic Development for the State of New Hampshire for a term of four years, expiring April 1, 1978. On July 21, 1975, Respondents passed a Resolution in the Nature of a Petition for the Appellant's Removal. On September 25, 1975, Respondents held a hearing on this Petition at which Appellant appeared. Subsequent to that hearing, the Respondents made findings and an Order that the Appellant be removed "for the good of the Department," pursuant to N.H. R.S.A. 4:1 (1970). Appellant's Motion for Rehearing was denied by the Respondents on October 29, 1975. On December 1, 1975, Appellant filed a Petition for Certiorari in the New Hampshire Supreme Court, asking that the decision of the Respondents be reversed. On July 30, 1976, the Supreme Court of the State of New Hampshire dismissed Appellant's Petition for Certiorari. On August 31, 1976, Appellant's Motion for a Rehearing before the New Hampshire Supreme Court was denied. The New Hampshire Supreme Court explicitly rejected Appellant's challenge to the application of N.H. R.S.A. 4:1 (1970), and therefore, this matter is appropriately brought to this Court by appeal. *See, e.g., Elrod* v. *Burns,* ——— U.S. ———, 96 S. Ct. 2673 (1976); *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968).

Constitutional and Statutory Provisions Involved.

This case involves the First and Fourteenth Amendments to the Constitution of the United States.

This case involves the following state statutes:

1. N.H. R.S.A. 4:1 (1970) reads as follows:

> *Removal of Public Officers for Cause.* Except as otherwise specifically provided, no official of the state outside of the state classified service shall be discharged or removed except by the governor and council for malfeasance, misfeasance, or inefficiency in office, or incapacity or unfitness to perform his duties, or for the good of the department, agency, or institution to which he is assigned. The attorney general, or the appointing authority of such official, may petition the governor and council for his removal, setting forth the grounds and reasons therefor. The governor and council shall hold a public hearing upon such petition, giving due notice thereof to such official no less than thirty days before the hearing, and shall, if they find, upon due hearing, good cause for removal of such official, order his removal from office.

2. N.H. R.S.A. 12-A:1-c, *Powers and Duties of Department of Resources and Economic Development,* reads as follows:

> In addition to any other powers and duties set forth in this chapter or as otherwise provided by statute, the department of resources and economic development shall have the power and duty to plan and conduct a program of information and publicity to attract tourists, visitors, industrial concerns and other interested persons from outside the state to the state of New Hampshire, and also to encourage, coordinate, and participate in the efforts of other public and private organizations or groups of citizens in order to publicize the facilities, industrial advantages and

other attractions of the state for the same purposes. The commissioner shall assign, with the approval of the advisory commission, such duties and functions to the three divisions of the department, as in his discretion will best effectuate the purposes, powers and duties set forth in this section and as otherwise provided by statute.

3. N.H. R.S.A. 12-A:2 (1970), *Commissioner of Resources and Economic Development,* reads as follows:

There shall be a commissioner of resources and economic development who shall be appointed by the governor and council for a term of four years from the date of his appointment and until his successor is appointed and qualified. A vacancy shall be filled for the unexpired term. It shall be the responsibility of the commissioner to organize and direct the work of the department. The commissioner of resources and economic development shall appoint one member of his staff who shall act in his stead when said commissioner is absent from the state and at such other times as he is so directed by the commissioner. When acting for the commissioner said person shall have all the power, duties and authority of the commissioner. Directors of departmental divisions shall be subject to the supervisory authority of the commissioner, which authority shall include power to establish department and divisional policy as well as to control the actual operations of the department and all divisions therein. The commissioner shall consult with the advisory commission prior to the establishment of general and divisional departmental policy.

4. N.H. R.S.A. 12-A:3 (Supp. 1975), *Directors of Divisions.*

The commissioner shall nominate for appointment by the governor and council a director of forests and lands, a director of economic development, and a director of parks and recreation, each of whom shall serve, subject to the provisions of R.S.A. 4:1, for a term of four years from the date of his appointment and until his successor is appointed and qualified. Any vacancy in such office shall be filled for the unexpired term in the same manner as the original appointment. Directors of divisions shall be responsible for the administration and operation of their respective divisions, subject to the supervisory authority of the commissioner, as set forth in R.S.A. 12-A:2.

Questions Presented.

Appellant was removed from his position as Director of Economic Development for the State of New Hampshire by Respondents explicitly because of his criticism of the location of a pulp mill in the Connecticut River Valley. This criticism occurred during a question and answer period following a speech given by the Appellant to the Chamber of Commerce of the City of Manchester, New Hampshire. At a public hearing, Respondents found that this criticism provided a basis for dismissal pursuant to N.H. R.S.A. 4:1 (1970) which provides a standard for the removal of state officials who are not members of the state classified service. The Appellant's statement clearly involves a matter of public importance and interest and would therefore appear to be speech protected by the First and Fourteenth Amendments to the United States Constitution. Thus, the following question of importance is raised by this appeal:

Whether the First and Fourteenth Amendments permit the dismissal of a tenured, non-civil service state employee who has been publicly critical of a state policy pursuant to a state statute permitting dismissal "for the good of the department . . . to which he is assigned," when no adverse impact on the efficiency of effectiveness of state government has been shown to result from his speech.

Statement of Case.

Appellant was appointed Director of the Division of Economic Development by Respondents on June 27, 1974. On June 18, 1975, Appellant made a speech to a Chamber of Commerce breakfast meeting in Manchester, New Hampshire. The text of his speech dealt with economic matters and did not relate to a proposed pulp mill in the Connecticut River Valley. Following the speech, a question and answer period ensued. One of the questions asked was as follows:

> How do you see the proposed $200,000,000 pulp mill in the Connecticut River Valley benefiting the State of New Hampshire?

Appellant responded as follows:

> I'll be short and sweet on that one. The official policy of the Administration because Governor Thomson unilaterally announced that the pulp mill will locate in the Connecticut River Valley, his official state policy is that we are pro pulp mill and it's official department policy we are pro pulp mill. And it's official division policy that we are pro pulp mill. But I got chewed out two weeks ago by the Governor for speaking up on snow-making at Mount Sunapee where I opposed spending $850,000 for putting and making snow flakes for a few skiers when we have unemployed in the state. I think it was wrong and I think it's wrong now. But he told me that he expected me to, if I was going to be on the team that when he blew the whistle that I would be on the field on his side, so, but I'm going to get off the field for just one minute and go on the bench and say that I think that the idea of a pulp mill stinks. It contravenes everything that this state everything that we are trying to do, that I've talked to you about, about quality, it would be a catastrophe in my judgment. Don't quote me on that. I don't think that works with the Governor. (Appendix C at 35-36).

On June 18, 1975 Respondent Thomson, Governor of the State of New Hampshire, caused to be delivered to Appellant's residence a letter asking for his immediate resignation from his position as Director of the Division of Economic Development. In this letter, Respondent Thomson indicated that the reason for the request was the public statement made by Appellant in front of the Chamber of Commerce, criticizing the State's location of the pulp mill (App. C at 36).

By memo of the same date, George Gilman, Commissioner of the Department of Resources and Economic Development, and Appellant's superior pursuant to N.H. R.S.A. 12-A:2 (1970), purported to relieve Bennett of all duties for the Department's Economic Development Division.

By letter dated June 24, 1975, addressed to Respondent Governor and Council, Mr. Gilman petitioned for the removal from office of Appellant "for the good of the Department" pursuant to the provisions of N.H. R.S.A. 4:1 (1970). This petition specified the statement of Appellant

on June 18, 1975 as the basis for Gilman's petition for removal.

Following a request for, and the rendering of, an advisory opinion by the Supreme Court of New Hampshire as to the proper method pursuant to State law by which to fire Appellant, Respondents on July 21, 1975 unanimously passed a "Resolution in the Nature of a Petition for Removal." (Appendix A) Cited in this petition as the reason for removal was Appellant's statement in the June 18, 1975 speech: "I think the idea of a pulp mill stinks. It contravens everything that this State, everything that we are trying to do, that I've talked to you about, about quality, it would be a catastrophe, in my judgment." The petition stated that the speech constituted "direct and knowing insubordination" and thus provided a basis for the removal of Appellant "for the good of the Department of Resources and Economic Development" pursuant to N.H. R.S.A. 4:1 (1970). The petition further stated that, pursuant to his authority under N.H. R.S.A. 12-A:2 (1970), the Commissioner of the Department of Resources and Economic Development had established a policy to support the location of the pulp mill in question within the State of New Hampshire, that this policy had been clearly communicated to the Appellant and that the June 18, 1975 statement contravened this policy (App. A at 23).

On September 25, 1975, Respondents conducted a hearing in Concord, New Hampshire, on the petition to dismiss the Appellant. At that hearing, evidence was presented on the background of the Appellant's public statement. The evidence adduced revealed that in December, 1974 Respondent Thomson and others, including Commissioner Gilman, were actively considering the siting of a major pulp mill somewhere in the Connecticut River Valley and

that during that month, Appellant became aware of this proposed mill. On January 20, 1975 Respondent Thomson informed Commissioner Gilman by letter that "the Parsons and Whittemore people are anxious to keep their image at a low key." He requested that "any statement that you are [sic] anyone in your Department may wish to make relative to this organization be discussed with me before it is released." Commissioner Gilman indicated shortly thereafter to Appellant that "there was to be a low profile kept on the mill" (App. B at 27).

The evidence introduced at the hearing further established that on February 3, 1975, Appellant addressed a memo strongly critical of the mill plan to Commissioner Gilman. The memo raised four general objections to the proposed Parsons and Whittemore pulp mill project. On or about February 13, 1975 Appellant presented to Commissioner Gilman an additional seven page memorandum documenting his views as to the pulp mill project. Appellant's primary criticisms were the absence of any type of economic, environmental or sociological impact study and the drastic and profound impact which he thought the mill would have on the entire state (App. B at 27).

The evidence also indicated that during the winter of 1975, the Appellant made intensive investigations into the various problems associated with the location of a pulp mill in the Connecticut River Valley and these investigations only strengthened his opposition to such an idea. These views were communicated to Respondent Thomson in a letter dated March 17, 1975 and delivered to the Governor's office on March 19, 1975.

After completion of the September 25, 1975 hearing, on October 21, 1975 Respondents made findings of fact and issued an order that the Appellant be dismissed. Respondents D'Allesandro and Streeter dissented. The findings of

the Respondents appear as Appendix B. On October 24, 1975 Appellant filed a motion for rehearing which was denied on October 29, 1975. On November 24, 1975, Appellant sought a petition for certiorari to the Supreme Court of the State of New Hampshire. This petition asserted:

> That Petitioner's exercise of his right to speak on issues of public importance may not furnish the basis of his dismissal from public employment, absent proof of false statements knowingly and recklessly made by him. .

On July 30, 1976, the Supreme Court of the State of New Hampshire sustained the decision of the Respondents dismissing the Appellant, with Chief Justice Kenison and Associate Justice Grimes dissenting. Associate Justice Griffith, writing for the majority, concluded:

> The Director of Economic Development in the furtherance of his statutory duty to attract industry to the State acts through the spoken and written word. The facts found by the Governor and Council support their conclusion that the Plaintiff's remarks on June 13, 1975 [sic], were knowingly insubordinate and seriously compromised his ability to effectively carry out the responsibilities of the Department. Under these circumstances, his removal "for the good of the Department of Resources and Development" does not violate his First Amendment rights. *Arnett v. Kennedy, supra; Goldwasser v. Brown, supra; Meehan v. Macy, supra.* (App. C at 41.)

In reaching its conclusion, the majority deferred to the findings of fact of the Respondents (Appendix B at 25-32) rather than conducting an independent examination of the record. The majority reasoned that because the Commissioner of the Department of Resources and Economic Development had established a departmental policy which supported the location of a pulp mill on the Connecticut River Valley, and which the Appellant was aware of, and because he had been instructed that he should avoid any discussion of his position or any position on the mill, Appellant's criticism of the mill contrary to these instructions constituted insubordination. The majority concluded that since the Governor and Council had found that Appellant's criticism seriously compromised his ability to effectively carry out the responsibilities of the Department, any infringement on his First Amendment rights was more than outweighed by the State's interest in preserving fair and effective government.

In his dissent, Chief Justice Kenison concluded that the First Amendment did not permit the discharge of Appellant on the grounds of insubordination in the circumstances of this case. Justice Grimes' dissent concluded that the Governor and Council had failed to show that there was any material adverse effect on the functioning of the Department of Resources and Economic Development because of the June 18, 1975 statement. He characterized the Respondents' position as having "merely abstractly suggested that the interests of the Department were materially and substantially jeopardized. A mere tendency to impede the function of the Department is not sufficient to limit the Plaintiff's First Amendment rights." (Appendix C at 50). Inasmuch as the burden was on Respondents to justify their impingement of Appellant's First Amendment rights, Justice Grimes felt that their showing did not meet that burden.

On August 6, 1976, Appellant moved for a rehearing in the Supreme Court of the State of New Hampshire on the grounds, inter alia:

1. The Plaintiff's dismissal was in violation of his rights under the First Amendment of the Constitution of the United States and his rights under Part I, Article 22 of the New Hampshire Constitution, and hence the decision of the Governor and Council must be set aside and the Plaintiff returned to his duties as Director of the Division of Economic Development, Department of Resources and Economic Development.

On August 31, 1976, the motion for rehearing was denied.

A Substantial Federal Question Is Presented.

I. APPELLANT'S DISMISSAL PURSUANT TO N.H. R.S.A. 4:1 (1970) IS PROHIBITED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. *The Speech for Which Appellant was Dismissed was Speech Protected by the First and Fourteenth Amendments to the Constitution of the United States.*

There can be little doubt that the purpose of the First Amendment is to insure free and unfettered debate over issues of public importance. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964); *Pickering* v. *Board of Education*, 391 U.S. 563, 574, 88 S. Ct. 1731, 1737 (1968); *Buckley* v. *Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976); *Elrod* v. *Burns*, U.S. , 96 S. Ct. 2673 (1976). Appellant's speech certainly concerned a matter of vital public importance. The active promotion of a huge pulp mill in the State of New Hampshire would have serious economic, social, environmental and political consequences, not only for the immediate local area in which it was to be sited, but for the entire state, and perhaps the New England region. The decision to provide official government support to the location and successful siting of a

huge pulp mill and the wisdom of such a policy was certainly a matter of vital concern for all of the State's citizens and for other organizations, municipal and state, governmental and private.

Furthermore, it is quite clear that Appellant, as Director of Economic Development for the State of New Hampshire, was in a position to make informed and responsible comments on the project. This case does not involve speech which was of little use to the public in considering important public issues, such as obscenity, *Miller* v. *California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), or speech which contained false or reckless statements, and which was defamatory about public officials, *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). Rather the speech was informative on a vital issue, albeit directly critical of a state policy. It is this type of speech that has traditionally been most centrally protected by the First Amendment to the United States Constitution.

Consequently, it is clear that the comments made by Appellant were protected by the First and Fourteenth Amendments to the Constitution of the United States.

B. *The Dismissal of Appellant for Making a Critical Public Statement Encroached on His First and Fourteenth Amendment Rights.*

It can no longer be argued that the First and Fourteenth Amendments do not apply in considering the permissibility of dismissal of a public employee on the basis of his public statements. In a long line of cases, commencing with *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215 (1952), and ending most recently with *Elrod* v. *Burns*, U.S. , 96 S. Ct. 2673 (1976), this Court has recognized that a public employee has a valid interest in

the exercise of First Amendment rights and has limited the ability of state and federal governments to condition his future or continued employment on his willingness to relinquish those rights. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

In two recent cases, this Court has recognized that dismissal of a public employee on the basis of his exercise of First Amendment freedoms encroached on his First Amendment rights. In *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968), this Court held that a school board could not constitutionally dismiss a teacher who wrote a letter to a local newspaper criticizing the actions of his school board, absent proof that his statements were knowingly or recklessly false. In *Elrod* v. *Burns,* U.S. , 96 S. Ct. 2673 (1976), this Court held that non-civil service county employees could not be dismissed simply because of their political affiliations.

It is thus clear that dismissal of Appellant because of his exercise of First Amendment rights encroaches on those First Amendment rights despite his status as a public employee.

C. *The Appellant's Interest in the Exercise of His First and Fourteenth Amendment Rights must be Balanced Against the State's Interest in His Dismissal.*

In *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968), the Court established a standard for state regulation of the speech of its employees. The Court stated:

> The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568, 88 S. Ct. at 1734-1735.

In *Elrod* v. *Burns,* U.S. , 96 S. Ct. 2673 (1976), the Court held that once an encroachment on a public employee's First Amendment rights was shown, a justification for that encroachment must be demonstrated by the State. *Id.* at 2684. The justification must be substantial: "The [state] interest advanced must be paramount, one of vital importance and the burden is on the Government to show the existence of such an interest." *Id.*

It might be argued that *Pickering* and *Elrod* are distinguishable on the ground that Appellant is neither a teacher nor a low-level patronage appointee. It is true that he is an appointee of the Respondents with some ability to influence the formulation of policy within the Department of Resources and Economic Development. However, for the purposes of this inquiry the particular position of a government employee does not lessen the extent of encroachment on First Amendment rights; his position should only determine the governmental interest in being permitted to make the encroachment on his rights. The validity of this point is apparent from the Court's holding in *Pickering* that the First Amendment interest of the public employee do not differ from those of the general citizenry; it is only the government's interest in the regulation of those interests that may vary in the case of the public employee from the general citizen. *Pickering* v. *Board of Education,* 391 U.S. at 568, 88 S. Ct. at 1734. *See also Elrod* v. *Burns,* U.S. , 96 S. Ct. at 2684.

D. *Respondents have Failed to Demonstrate a Compelling Interest that Justifies the Encroachment on Appellant's First Amendment Interests.*

The types of government interests necessary to justify an intrusion on Appellant's First Amendment interests would appear to be those necessary to promote the efficiency of the public services it performs through its employees. *Pickering* v. *Board of Education,* 391 U.S. at 568, 88 S. Ct. at 1734-1735. Furthermore, the plurality opinion in *Elrod* requires more than just a showing of a legitimate state interest; rather the government has the burden of demonstrating a "paramount" interest, "one of vital importance." *Elrod* v. *Burns,* U.S. , 96 S. Ct. at 2684. *See also Buckley* v. *Valeo,* 424 U.S. 1, 88, 96 S. Ct. 612, 632 (1976).

In *Pickering,* the Court suggested a variety of state interests, which might be sufficient in an appropriate case, to justify dismissal of a public employee because of statements made by him. It is submitted that none of these interests justify the Appellant's dismissal:

1. The Court suggested that in some governmental positions, the need for confidentiality might be so great as to warrant dismissal after a breach of that confidentiality. 391 U.S. at 570, n.3, 88 S. Ct. at 1735, n.3. No such claim was made by Respondents here.

2. The Court suggested that in certain positions in public employment in which the relationship between superior and subordinate is of a personal and intimate nature, criticism of the superior by the subordinate might undermine the effectiveness of the working relationship between them. *Id.* No testimony relating to the working relationship between Appellant and his immediate superior or the effect of Appellant's statement on that relationship appears in the record. More to the point, it

does not appear that Appellant criticized his superior; rather, he was critical of a decision of his superior and Respondent Thomson on an issue of public importance.[1] It would thus appear that this interest would not justify the encroachment on Appellant's First Amendment interests.

3. The *Pickering* Court noted that the letter written by the teacher was not shown to have either "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572-573, 88 S. Ct. at 1737. Presumably, this statement suggests that a disruption of public service generally or disruption of the individual's particular duties may be permissible grounds for dismissal. *Note, The First Amendment and Public Employees:* Times *Marches On,* 57 Geo. L.J. 134, 154 (1968). This ground was apparently recognized as a permissible basis for dismissal in *Elrod* as well, although the Court in that case found that the state had not met its burden of demonstrating such a disruption or interference with effectiveness and efficiency of government. The *Elrod* Court noted that patronage dismissals of non-tenured, non-civil service employees did not significantly further the Government's interest in effectiveness and efficiency. This interest would appear to be the interest upon which Respondents rely in asserting their right to dismiss the Appellant for his June 18, 1975 statement.

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[1] At best, the Appellant's criticism of the policy might be characterized as an indirect criticism of his superior. But even if this were a basis for dismissal under *Pickering,* the record below simply does not support dismissal here. That the record below must so support dismissal in a case involving First Amendment rights is made clear by prior decisions of this Court. See discussion in text, *infra* at D(3).

Respondents found that the Appellant's remarks on June 18, 1975 were knowingly insubordinate and seriously compromised his ability to carry out his departmental responsibilities. Appendix B, Findings 23 and 24. The New Hampshire Court construed N.H. R.S.A. 4:1 (1970) as permitting dismissal for this reason. However, as was pointed out by Justice Grimes in dissent, there was no showing made by Respondents of any material adverse impact on the functioning of the Department of Resources and Economic Development.

It has been clearly established that in determining whether an individual's First Amendment interests have been impermissibly burdened, this Court will examine the record below independently to determine whether the facts relating to that individual's claim have been properly found. See, e.g., *Pickering* v. *Board of Education,* 391 U.S. at 578, n.2, 88 S. Ct. at 1740; *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285, 84 S. Ct. 710, 728 (1964). In *Pickering* the Court made an independent review of the record in part because the School Board had been victim, prosecutor and finder of fact in the first instance and the state courts had deferred to its findings of fact. 391 U.S. at 578, n.2, 88 S. Ct. at 1740, n.2. These circumstances also exist in the instant case where the New Hampshire Supreme Court has deferred to the facts as found by Respondents (Appendix C at 33-45). It is thus appropriate for this Court to examine the transcript of the hearing before Respondents to ascertain the correct facts.

The only testimony relating to an adverse impact on state government resulting from Appellant's statement was adduced from Commissioner Gilman. He indicated that in his opinion it was important for the Department of Resources and Economic Development to speak with

a unified voice in attracting industry to New Hampshire. He also testified that a public appearance of dissension within the Department "would give rise to morale and disciplinary problems and, in my view, any organization must speak with one voice in a matter of this kind, and to countenance such a rejection would cause such a babble and confusion amongst all people who must deal with the State as to make the job of the Department almost impossible." There was not one shred of concrete evidence that morale or discipline in the Department of Resources and Economic Development actually did suffer or would even be likely to suffer. There was not one shred of evidence that any industry was discouraged from moving to New Hampshire by the Appellant's statement or that industry would be discouraged by disunity of the Department. The only evidence offered on the impact of Appellant's statement was the vaguely expressed fear of Appellant's supervisor and accuser that a unified voice was important.

Thus, Appellant was dismissed solely because of a public statement disagreeing with Respondent Thomson's policy, a statement related to whether a pulp mill should be sited in the State of New Hampshire without adequate investigation.

Under certain circumstances, the avoidance of such public disagreement might constitute a sufficient state interest to justify the dismissal of Appellant for speaking out. Where state officials are appointed by and serve at the pleasure of the Governor, it is arguable that the purpose of their office is to support the Governor in all of his lawful policy decisions. Unity in this case may be seen as essential to permit the Governor to implement those policies that he was presumably elected to implement. However, the structure of New Hampshire's sys-

tem of public officials indicates that such unity is not a compelling interest in this State at least as to tenured state officials. Public officials do not serve at the pleasure of the Governor or even the Governor and Council. They are tenured and can be removed for certain specified infractions. *See* N.H. R.S.A. 4:1, 12-A:2, 12-A:3. Because officials such as the Appellant serve a term of four years it is clear that in most cases, their terms of office will not even be contiguous with that of the Governor, who serves only a two year term. N.H. Const. Art. 42. It is thus clear that officials such as Appellant owe their primary loyalty to the citizens of the State and not the Governor or their superior. This argument is offered, not for the purpose of involving the United States Supreme Court in the interpretation of state law, but for the purpose of demonstrating that unity of opinion over state policy cannot be a compelling state interest in the instant case inasmuch as it is inconsistent with the structure of government in New Hampshire.

Respondents might argue that N.H. R.S.A. 12-A:1-c, which imposes a duty on the Department of Resources and Economic Development to attract industry to the State of New Hampshire, prohibited Appellant from publicly discouraging an industry from coming to the State and that the violation of this statutory duty provides a sufficient basis for the Appellant's dismissal. However, this argument necessarily assumes a violation of the statutory duty and that the statute requires the Department to attempt to attract all industry which may wish to locate in New Hampshire. It further assumes that the record supports a finding that Appellant's duty to attract industry was compromised by his statement on June 18, 1975. None of these assumptions are supported by the record below.

In balancing the competing values in this case, the right of a citizen to speak out and the right of the citizenry in general to know the facts from one who knows far more than they outweighs any interest of the Respondents in unity of public opinion between the Governor and an official of the State whose term of office is not even contiguous with that of the Governor. It is therefore submitted that the removal of the Appellant by Respondents was wrongful and an impermissible burden on his First and Fourteenth Amendment interests.

E. *Appellant's Federal Question Is Substantial in that No Case Decided by the United States Supreme Court Disposes of the Issues Raised by This Appeal.*

The case before this Court raises questions significantly different than previous cases dealing with the rights of public employees. Those cases have concerned largely non-policy making officials. *See, e.g., Elrod* v. *Burns,* U.S. , 96 S. Ct. 2673 (1976); *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO,* 413 U.S. 548, 93 S. Ct. 2880 (1973); *Perry* v. *Sindermann,* 408 U.S. 593, 92 S. Ct. 2694 (1972); *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 87 S. Ct. 675 (1967). In the instant case, Appellant clearly has some policy-making functions and to that extent his case is not comprehended by the rationale of *Elrod.* The case is thus clearly not disposed of by any existing authority, although Appellant does submit that an application of the principles of *Pickering* and *Elrod* will result in reversal of the decision of the New Hampshire Supreme Court.

Conclusion.

For the reasons stated above, it is respectfully submitted that the question raised by the Appellant's dismissal and its subsequent affirmance by the New Hampshire Supreme Court is substantial and of vital public importance. The importance of this question clearly warrants this Court's attention and Appellant respectfully requests that this Court note probable jurisdiction of Appellant's claim and set this cause down for argument.

Respectfully submitted,

KIMON S. ZACHOS,
JAMES E. HIGGINS,
MICHAEL C. HARVELL,
SHEEHAN, PHINNEY, BASS &
GREEN PROF. ASS'N,
1000 Elm Street,
Manchester, New Hampshire 03101.
(603) 668-0300
Attorneys for the Appellant.

Appendix A.

Resolution in the Nature of a Petition for Removal

WHEREAS, the Commissioner of the Department of Resources and Economic Development, pursuant to his statutory authority contained in RSA 12-A:2, to wit, ". . . which authority shall include power to establish department and divisional policy as well as to control the actual operations of the department and all divisions therein . . .", did establish a policy to support the location of a major pulp mill within the State of New Hampshire; and

WHEREAS, said departmental policy was clearly communicated to Edward J. Bennett, Director, Division of Economic Development; and

WHEREAS, the said Edward J. Bennett on June 18, 1975 in a public speech in the City of Manchester did declare: "I think the idea of a pulp mill stinks. It contravenes everything that this state, everything that we are trying to do that I have talked to you about, about quality — it would be a catastrophe, in my judgment"; and

WHEREAS, said statement was in direct contravention of established departmental policy; and

WHEREAS, in the opinion of the Governor and the Honorable Council said action did constitute direct and knowing insubordination;

NOW, THEREFORE, BE IT RESOLVED, that the Governor and Council hereby initiate removal procedures against the said Edward J. Bennett under the provisions of N.H. Revised Statutes Annotated, Chapter 4, section 1, for the good of the Department of Resources and Economic Development; and

BE IT FURTHER RESOLVED, that the Secretary of State or his Deputy is hereby directed to serve a copy of this Resolution upon the said Edward J. Bennett at the

earliest practicable time and to make return of service to the Governor and Executive Council.

Meldrim Thomson, Jr.
Governor
Lyle E. Herson
Councilors James H. Hayes
Leon G. Yeaton
Louis D'Allesandro
Bernard A. Streeter, Jr.

Aug. 27, 9 a.m.

Appendix B.

THE STATE OF NEW HAMPSHIRE
EXECUTIVE COUNCIL CHAMBERS
CONCORD, NEW HAMPSHIRE

Re:

Petition for Removal of
Edward J. Bennett

FINDINGS AND ORDER

On July 21, 1975, the Governor and Council, pursuant to the provisions of RSA 4:1, adopted a Resolution in the Nature of A Petition for Removal of Edward J. Bennett from the Office of Director, Division of Economic Development, within the New Hampshire Department of Resources and Economic Development. Due notice of the grounds and reasons for removal together with due notice of the time and place of a public hearing on said petition were served upon the Respondent on July 21, 1975, by Robert L. Stark, Secretary of State. At the request of the Respondent, a continuance from the original hearing date (August 26, 1975) was granted and the matter came on for hearing on September 25, 1975, at 9:00 a.m.

Based upon the evidence presented at the hearing, the Governor and Council hereby make the following findings:

1. Edward J. Bennett was appointed, under RSA 12-A:3, Director of the Division of Economic Development (hereinafter referred to as the "Division") within the New Hampshire Department of Resources and Economic Development (hereinafter referred to as the "Department") on or about June 27, 1974, and at all times pertinent to this cause has held that office.

2. George T. Gilman was appointed, under RSA 12-A:2, Commissioner of the Department in July of 1970 and at all times pertinent to this cause has held that office.

3. The Department is under the "executive direction" (RSA 12-A:1) of the Commissioner and it is his responsibility "to organize and direct the work of the Department". (RSA 12-A:2).

4. By statute, the Department is charged with, among other duties, encouraging the "development of industry . . . within the state" (RSA 12:1) and is given "the power and duty to plan and conduct a program of information and publicity to attract . . . industrial concerns . . . from outside the state to the State of New Hampshire, and also to encourage, coordinate and participate in the efforts of other public and private organizations or groups of citizens in order to publicize the . . . industrial advantages . . . of the State for the same purposes". (RSA 12-A:1-c). Within the Department, the responsibility for carrying out these statutory policies rests with the Division of Economic Development.

5. Upon taking office, Director Bennett familiarized himself with the statutes relating to the duties and responsibilities of the Department and the Divisions thereof.

6. Director Bennett understood that in his capacity as Director of the Division of Economic Development he was responsible to, subordinate to, and under the supervision of Commissioner Gilman.

7. As Director of the Division of Economic Development, Mr. Bennett had the duty and responsibility to carry out the policies of the Department and the Division as established by the legislature and as implemented under the executive direction of the Commissioner.

8. In December of 1974, Commissioner Gilman became aware that the Parsons and Whittemore Company was considering locating a major pulp mill in New Hampshire.

9. In December of 1974, Commissioner Gilman, in the exercise of his executive authority and responsibility to implement the statutory policies for his Department, determined that as a matter of policy the Department would assist and encourage the company to locate in New Hampshire, subject to all federal, state and local requirements.

10. During the months December, 1974, and January, 1975, as a result of discussions with Commissioner Gilman, Director Bennett was made aware of the proposal of the Parsons and Whittemore Company to site a major pulp mill in New Hampshire and the Department's policy concerning the location of a major pulp mill in New Hampshire.

11. Director Bennett knew that the location of a major pulp mill in New Hampshire would require compliance with all applicable federal and state regulations.

12. By memo dated February 3, 1975, to Commissioner Gilman, Director Bennett expressed his strong opposition to the Parsons and Whittemore project and stated that "the location of any pulp mill of this magnitude would be an economic holocaust which would drastically and adversely affect the economy of the state as we know it now, and at least as I would like to see it remain". (Petitioner's Exhibit A).

13. At the suggestion of Commissioner Gilman, Director Bennett further documented his dissent by a memorandum to Commissioner Gilman dated February 13, 1975. Director Bennett concluded this memorandum with the following sentence: "Accordingly, I respectfully request to be excused from an official or unofficial capacity in either advocating or defending the proposition." (Petitioner's Exhibit C).

14. In February of 1975, after discussion with Director Bennett, Commissioner Gilman acceded to Director Bennett's request that he be excused from any official or unofficial capacity in either advocating or defending the lo-

cation of a major pulp mill in New Hampshire. Commissioner Gilman informed Director Bennett that he respected his views, that if he could not conscientiously advocate the location of a pulp mill in New Hampshire the Commissioner himself would be the point man, would take the position for the Department, and for the purpose of industrial development solicitation would speak affirmatively for the proposal. The Commissioner clearly communicated to Director Bennett that the policy of the Department and the Division was to support the location of the pulp mill in New Hampshire. The Commissioner told Director Bennett that because of his feelings about the mill he should avoid discussion of his position or any position concerning the mill.

15. After Commissioner Gilman had acceded to Director Bennett's request, at all times pertinent to this cause, Director Bennett was not called upon to take an official role with respect to the mill project with one possible exception when he was asked to attend a meeting with company officials, an assignment which he was willing to undertake.

16. After Commissioner Gilman had acceded to Director Bennett's request, Director Bennett understood that he was not to make public statements in his official capacity concerning the Parsons and Whittemore pulp project. Director Bennett realized that any public statements made by him in his official capacity adverse to the policy of the Department relative to the Parsons and Whittemore proposal would certainly be harmful to the Department.

17. On at least one other occasion, during the spring of 1975 and prior to June 18, 1975, Commissioner Gilman told Director Bennett not to become identified with opposition to the mill proposal. Director Bennett assured Commissioner Gilman that he was not becoming identified with the mill proposal, and in particular with opposition to it, either publicly or in any way.

18. On June 18, 1975, Director Bennett spoke to a breakfast meeting of the Manchester Chamber of Commerce in his official capacity as Director of the Division of Economic Development. His speech dealt with economic development in the state.

19. During a question and answer period which immediately followed his speech, the first question asked of Director Bennett was:

> "How do you see the proposed $200,000,000 pulp mill in the Connecticut River Valley benefiting the State of New Hampshire?"

20. Director Bennett made the following response to the question:

> "I'll be short and sweet on that one. The official policy of the administration because Governor Thomson unilaterally announced that the pulp mill will locate in the Connecticut River Valley, his official State policy is that we are pro pulp mill and it's official Department policy that we are pro pulp mill. And it's official division policy that we are pro pulp mill. But I got chewed out two weeks ago by the Governor for speaking up on snow-making at Mt. Sunapee where I oppose spending eight hundred fifty thousand dollars for putting and making snowflakes for a few skiers when we have unemployed in the State. I think it was wrong and I think it's wrong now. But he told me that he expected me to, if I was going to be on the team, that when he blew the whistle that I would be on the field on his side, so, but I'm going to get off the field for just one minute and go on the bench and say that I think that that idea of a pulp mill stinks. It contravenes everything that this State, everything that we are trying to do, that I've talked to you about, about quality, it would be a

catastrophe in my judgment. Don't quote me on that. I don't think that works with the Governor."

21. Director Bennett was aware and knew that his remarks before the Manchester Chamber of Commerce were at a public occasion.

22. Director Bennett was aware and knew that his statements before the Manchester Chamber of Commerce in opposition to the pulp mill were diametrically opposed to the policies of both the Department of Resources and Economic Development and the Division of Economic Development.

23. Director Bennett's statements before the Manchester Chamber of Commerce in opposition to the pulp mill were made in his official capacity as Director of the Division of Economic Development, were in direct contravention of statutory policies, were in direct contravention of policies established by the Department, were in direct contravention of instructions given to him by Commissioner Gilman, and constituted direct and knowing insubordination.

24. By statute, the Department of Resources and Economic Development is required to solicit and to encourage industry to locate in the State of New Hampshire. Within the departmental structure this duty and responsibility is carried out by the Director of the Division of Economic Development, subject to the supervisory authority of the Commissioner. In order to have an effective and credible program of industrial solicitation and encouragement, it is essential that a deliberate and organized approach be used and that the policies of the Department be expressed with a unified voice. The Department must speak clearly, strongly, and credibly in an affirmative way in order to encourage industry to locate in New Hampshire. Any such program of industrial solicitation must be coordinated and implemented by a Director of Economic Development who speaks affirmatively and credibly to and for industry. It is the

duty and responsibility of the Director to act in accordance with statutory policies, in accordance with the policies of the Department, and in accordance with the instructions of the Commissioner. Director Bennett did not carry out his duties and responsibilities and has thereby adversely affected the effectiveness, public credibility, and efficiency of the Department. As a result of the public statements by Director Bennett relative to the pulp mill (as set forth in paragraph 20) the ability of the Department and of Director Bennett to carry out effectively their duties and responsibilities has been seriously compromised.

25. Based on the evidence presented, the Governor and Council find that Edward J. Bennett should be removed from the Office of Director, Division of Economic Development, for the good of the Department of Resources and Economic Development.

26. With respect to the requests for findings submitted by the Petitioner and by the Respondent, they are granted to the extent that they are included in the findings hereinabove set forth; otherwise they are denied on the grounds that they are irrelevant, contrary to the law, or not supported by a fair preponderance of the evidence.

NOW, THEREFORE, in accordance with the provisions of RSA 4:1, the Governor and Council hereby order that Edward J. Bennett be and hereby is removed from the office of Director, Division of Economic Development, within the Department of Resources and Economic Development, said order to be effective forthwith.

Time 4:20 p.m.
Date Oct. 21, 1975

/s/ Meldrim Thomson, Jr.
Meldrim Thomson, Jr.
Governor
Lyle E. Herson
James H. Hayes
Leon G. Yeaton

Councilors

Dissenting:

Louis D'Allesandro
Bernard A. Streeter, Jr.

Attest: Edward C. Kelley

Appendix C.

Edward J. BENNETT

v.

Meldrim THOMSON, Jr., et al.

No. 7383.

Supreme Court of New Hampshire.
Original.

July 30, 1976.

Sheehan, Phinney, Bass & Green and James E. Higgins, Manchester, for plaintiff.

Perkins & Brock, Concord (David A. Brock, Concord, orally), for defendants.

GRIFFITH, Justice.

Petition for writ of certiorari seeking review of the decision of the defendants, the Governor and members of the Executive Council, dismissing the plaintiff, Edward J. Bennett, from his position as director of the division of economic development.

On June 26, 1974, the Governor and Council appointed the plaintiff as director of this division in the department of resources and economic development for a term of years expiring April 1, 1978. George Gilman was commissioner of the department of resources and economic development during the period of the plaintiff's employment and the plaintiff was subject by statute to the supervision and control of the commissioner in the operation of his division. RSA 12-A:2; RSA 12-A:3 (Supp.1975).

In December 1974, Commissioner Gilman learned that the Parsons and Whittemore Company was considering locating a pulp mill in New Hampshire. The Governor and the commissioner actively supported and advocated the Parsons and Whittemore pulp mill location in the State. The charges that resulted in the removal of the plaintiff from office arose from a speech he delivered on June 18, 1975 to the Manchester Chamber of Commerce in his official capacity as director of the division of economic development. In the question and answer period that followed Bennett was asked:

> "How do you see the proposed $200,000,000 pulp mill in the Connecticut River Valley benefiting the State of New Hampshire?"

The plaintiff responded as follows:

> "I'll be short and sweet on that one. The official policy of the Administration because Governor Thomson unilaterally announced that the pulp mill will locate in the Connecticut River Valley, his official state policy is that we are pro pulp mill - and it's official department policy we are pro pulp mill. And it's official division policy that we are pro pulp mill. But I got chewed out two weeks ago by the Governor for speakng up on snow-making at Mount Sunapee where I opposed spending $850,000 for putting and making snow flakes for a few skiers when we have unemployed in the state. I think it was wrong and I think it's wrong now. But he told me that he expected me to, if I was going to be on the team that when he blew the whistle that I would be on the field on his side, so, but I'm going to get off the field for just one minute and go on the bench and say that I think that the idea of a pulp mill stinks. It contravenes everything that this state everything that we are trying to do, that I've talked to you about,

about quality, it would be a catastrophe in my judgment. Don't quote me on that. I don't think that works with the Governor."

Upon learning of these remarks, the Governor wrote to the plaintiff and requested his resignation. Bennett refused, and on July 21, 1975, the Governor and Council passed a resolution in the nature of a petition for the plaintiff's removal, having first determined by resort to this court that they, rather than the commissioner of resources and development, constituted the "appointing authority" of the director of economic development, within the meaning of RSA 4:1; *Opinion of the Justices,* 115 N.H. 385, 341 A.2d 758 (1975). On September 25, 1975, a hearing on the petition was held by the Governor and Council, at which findings were made that Bennett's statements on June 18 were contrary to established and divisional policy, and were in direct contravention of instructions which Bennett had received from Commissioner Gilman. Accordingly, it was determined that Bennett be removed "for the good of the department." The findings and order were signed by the Governor and three Councilors. Councilors D'Allesandro and Streeter noted their dissenting votes. Bennett's motion for rehearing was denied by the defendants on October 29, 1975.

I.

Plaintiff Bennett contends that his discharge on the basis of remarks made by

him on matters of public concern violates his constitutional right to freedom of speech guaranteed by the first amendment to the Constitution of the United States. Consideration of the plaintiff's first amendment claim must be in the light of the statutes applicable to his duties and the events, as found by the Governor and Council, which preceded the public statement of the plaintiff on June 18, 1975. Since the facts found by the Governor and Council are supported by evidence and are not unreasonable or arbitrary, we are limited to a determination of whether on the facts found plaintiff could legally be dismissed. *Quinn v. Concord*, 108 N.H. 242, 233 A.2d 106 (1967).

RSA 12–A:1–c enumerates certain powers and duties of the department of resoures and economic development. Among them is "the power and duty to plan and conduct a program of information and publicity to attract . . . industrial concerns . . . from outside the state to the state of New Hampshire, and also to encourage, coordinate, and participate in the efforts of other public and private organizations or groups of citizens in order to publicize the facilities, industrial advantages and other attractions of the state for the same purposes." Within the department, the responsibility for carrying out the statutory duties of the department concerning industry rests with the division of economic development.

RSA 12–A:2 provides in pertinent part

that [d]irectors of departmental divisions shall be subject to the supervisory authority of the commissioner, which authority shall include power to establish department and divisional policy as well as to control the actual operations of the department and all divisions therein."

In December 1975 and January 1976, as a result of discussions with Commissioner Gilman, the plaintiff was informed of the Parsons and Whittemore Company's interest in building a pulp mill in New Hampshire and that the commissioner had determined that the department would assist and encourage the company to locate in New Hampshire. In a memorandum to the commissioner dated February 3, 1975, Director Bennett set forth his opposition to the Parsons and Whittemore project and at the suggestion of the commissioner further documented his dissent in a memorandum of February 13, 1975. This memorandum concluded with the following sentence. "Accordingly, I respectfully request to be excused from an official or unofficial capacity in either advocating or defending the proposition."

After the above memorandum, the commissioner informed Director Bennett that because of his feelings about the mill the commissioner would undertake to speak for department in furtherance of departmental policy of encouraging the location of the mill in New Hampshire. The commissioner instructed Bennett that he should avoid discussion of his position or any position on the mill. Both the plaintiff and the

defendants agree that the plaintiff's first amendment claim is governed by *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court's major discussion of the firt amendment rights of public employees. Understandably, they differ in their application of the *Pickering* standard to the present case.

In *Pickering*, the Court stated "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734.

Applying that test, the Court went on to state: "What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these

circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 572–73, 88 S.Ct. at 1737.

[1, 2] The first amendment rights of public employees enunciated in *Pickering* do not prevent the government by statute from forbidding activities including speech which are hazardous to fair and effective government. *CSC v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). Nor do first amendment rights prevent the discharge of an employee who has made statements which seriously impair the effectiveness of his performance, and substantially impede the very tasks he was assigned to accomplish. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Goldwasser v. Brown*, 135 U.S.App.D.C. 222, 417 F.2d 1169, 1176–77 (1969); *Meehan v. Macy*, 129 U.S.App.D.C. 217, 392 F.2d 822 (1968); *modified* 138 U.S.App.D.C. 38, 425 F.2d 469, *aff'd en banc*, 138 U.S.App.D.C. 41, 425 F.2d 472 (1969); Grossman, *Public Employment and Free Speech: Can They Be Reconciled?*, 24 Ad.L.Rev. 109 (1972).

In *Pickering v. Board of Education*, *supra*, 391 U.S. at 574, 88 S.Ct. at 1738 it is stated: "[I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public

communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be." Contrary to the situation in *Pickering* "the fact of employment" is here directly and substantially "involved in the subject matter of the public communication made."

[3] The director of economic development in the furtherance of his statutory duty to attract industry to the State acts through the spoken and written word. The facts found by the Governor and Council support their conclusion that the plaintiff's remarks on June 13, 1975, were knowingly insubordinate and seriously compromised his ability to effectively carry out the responsibilities of the department. Under these circumstances, his removal "for the good of the department of resources and development" does not violate his first amendment rights. *Arnett v. Kennedy supra; Goldwasser v. Brown supra; Meehan v. Macy supra.*

II.

[4] Plaintiff argues that the provision of RSA 4:1 authorizing removal from public office "for the good of the department" is unconstitutionally vague. In upholding similar language found in 5 U.S.C.A. § 7501(a), the Lloyd-LaFollette Act, the United States Supreme Court quoted with approval the following statement from *Meehan v. Macy supra*, 392 F.2d 822, 835: "[I]t is not feasible or necessary for the

Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected as to chill . . . freedom to engage in appropriate speech." *Arnett v. Kennedy*, 416 U.S. 134, 161–62, 94 S.Ct. 1633, 1648, 40 L.Ed.2d 15 (1974).

RSA 4:1 proscribes "only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of [state] employees than are necessary for the protection of the [State] as an employer." *Arnett v. Kennedy*, 416 U.S. at 162, 94 S.Ct. at 1648. Accordingly, we hold that the language "for the good of the department" in RSA 4:1 is neither void for vagueness nor overbroad.

III.

[5] Plaintiff contends that Commissioner Gilman had no authority under the statute to establish a valid departmental policy in favor of the pulp mill without consultation with the advisory commission. Commissioner Gilman testified that he did not consult with the advisory board on the pulp mill since he interpreted the requirements of RSA 12–A:2 as requiring such consultation only on administrative changes or realignment of functions within the department. Because the attraction of industry to the State is a duty specifically assigned to the department by RSA 12–A:1–c, the determination to assist in the location in the State of a specific company was not a matter of general "policy" contemplated by RSA 12–A:2.

[6] The commissioner's interpretation of the statute is correct and agrees with the direction to the commissioner contained in RSA 12–A:2 which states: "The commissioner shall consult with the advisory commission prior to the establishment of general and divisional departmental policy." Obviously a commission with a mandate by statute of four meetings a year (RSA 12–A:6) is not intended as a consultation commission to deal with "the actual operation" of the division (*see* RSA 12–A:2) such as decisions on the assistance to be offered individual companies.

IV.

[7] We cannot accept plaintiff's argument that RSA 4:1 does not authorize the Governor and Council to both initiate and judge the proceedings against him. The statute provides that either the attorney

general or the "appointing authority" of the official may institute proceedings for removal and that the Governor and Council shall hold a public hearing upon the removal petition. At the time RSA 4:1 was enacted, the legislature was aware that the Governor and Council were the "appointing authority" for most offices. Accordingly, it appears that the legislature intended that in cases such as this, removal proceedings would be conducted by the same parties who brought the charges. *Quinn v. Concord*, 108 N.H. 242, 244–45, 233 A.2d 106, 108 (1967).

Neither can we accept the argument of the plaintiff that a statutory scheme that combines these functions is a denial of due process. "The case law, both federal and state, generally rejects the idea that the combination with judging of prosecuting or investigating functions is a denial of due process. . . ." K. Davis, Administrative Law Treatise § 13.02, at 175 (1958); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Farrelly v. Timberlane Regional School Dist.*, 114 N.H. 560, 565, 324 A.2d 723, 726 (1974); *Quinn v. Concord*, 108 N.H. 242, 244–45, 233 A.2d 106, 108 (1967); *cf. Burhoe v. Whaland*, 116 N.H. —, 356 A.2d 658 (1976).

V.

[8] Plaintiff alleges that Governor Thomson and Councilors Streeter and Yeaton should have recused themselves for bias. In all three cases, this is based largely on the fact that the Governor asked for

plaintiff's resignation and the two Councilors publicly suggested that the plaintiff should resign. A request or suggestion that an official resign does not indicate a prejudgment of the issue of an official's dismissal for cause. Both Councilors Streeter and Yeaton recognized the distinction at the time and gave no indication of any prejudgment of plaintiff's case. In the case of the Governor, there is no indication that the request for resignation carried with it a prejudgment of the dismissal petition. In the case of Councilor Streeter, the charge of bias loses some force as a result of the Councilor's negative vote on plaintiff's dismissal.

Where the legislature has determined that the formal institution of removal proceedings does not disqualify the Governor and Councilors from adjudicating the case, we are unable to say that a request for resignation has any different effect. *Quinn v. Concord*, 108 N.H. 242, 244–45, 233 A.2d 106, 108 (1967).

[9] Plaintiff's final argument is that he should have been allowed to conduct a *voir dire* of the challenged officials. While RSA 500-A:22 (Supp.1975) provides for *voir dire* in the case of jurors, no authority, statutory or otherwise, has been cited to us for the proposition that a party is entitled to interrogate presiding judicial officers. Accordingly, we find that the Governor and Council committed no error in denying the plaintiff's motion.

Petition dismissed.

KENISON, C. J., and GRIMES, J., dissented; the others concurred.

KENISON, Chief Justice (dissenting):

Some time ago in a lone and lonely dissenting opinion I concluded that State employees were not second-class citizens who were required to give up their constitutional rights for the privilege of engaging in public employment. *Ratti v. Hinsdale Raceway*, 109 N.H. 270, 274, 249 A.2d 859, 862 (1969); Powell, *The Right to Work For the State*, 16 Colum.L.Rev. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968). Recent opinions have not diluted the validity of that conclusion. *Elrod v. Burns*, — U.S. —, 96 S.Ct. 2673, 49 L.Ed.2d — (1976). "The problem . . . is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

In 1964, the Constitutional Convention recommended and adopted an amendment specifically providing for freedom of speech. Mr. Bittenbender of Deering explained the amendment as follows: "What we have proposed to you, as amended, provides simply that the right of free speech which is, of course, an essential part of our heritage, is spelled out very clearly in the

Constitution. The Constitution presently has several references to it so that inferentially you can presume that the right to free speech is guaranteed in our New Hampshire Constitution. The right is, of course, guaranteed under our Federal Constitution. What we wanted to do was to be absolutely certain the Constitution was clear, that there could be no possible misunderstanding or misinterpretation of it. And we felt that the right to free speech should, consequently, be enunciated in the Constitution and we had included it with that part which relates to the liberty of the press . . . . " N.H.Jour.Const.Conv. 218 (1964). This amendment was approved by the people of the State by a vote of 185,340 in favor to 27,797 opposed. This amendment was approved in 1968 by 86.95% of the voters which was the highest percentage received for constitutional amendments in recent years. Consequently, N.H. Const. pt. I, art. 22 (Supp.1975) now reads as follows: "Free Speech; Liberty of the Press. Free speech and liberty of the press are essential to the security of freedom in a state. They ought, therefore, to be inviolably preserved."

The constitutional command of the New Hampshire constitution and the first amendment to the United States Constitution does not permit the discharge of the plaintiff from State service on the grounds of insubordination in the circumstances of this case. It is frequently easier to attempt to silence a critic than to answer him. But we have chosen a different system of gov-

ernment, one in which "the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

GRIMES, Justice (dissenting):

As I believe that the plaintiff's dismissal was in violation of his rights under the first amendment to the Constitution of the United States and his rights under part I, article 22 of the New Hampshire constitution, I must respectfuly dissent from the opinion of the court.

It is too late in the day to argue that public employment is a privilege which can be conditioned on the surrender of constitutional rights which could not be abridged by direct government action. *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv.L.Rev. 1439, 1445–46 (1968). The State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); *see Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972).

It should be stressed that the plaintiff had given a talk to the chamber of commerce concerning a topic that in no way

related to the pulp mill issue. Immediately following the talk, plaintiff was asked to participate in a question and answer period. It was at this point that a private citizen asked the plaintiff for his opinion concerning the establishment of the pulp mill. After articulating the department policy as to the pulp mill, the plaintiff gave his opinion on the project while making it clear it referred only to his personal opinion. There is no claim and no evidence that plaintiff was actively promoting his personal views on the pulp mill as opposed to the departmental policy, or that he has been publicly attacking the official policy. The sole basis for the dismissal was his honest response on this one occasion to a direct question. The petition for removal specifically articulates that the plaintiff's statement constituted insubordination so as to justify dismissal.

The question and answer concerned a matter of vast political and economic importance for the residents of the State, and as such there can be no doubt, that it falls within the parameters of free speech protection. As the right of free speech is not absolute, particularly in the area of public employment, it is the court's responsibility to determine whether a dismissal because of the exercise of free speech rights is unconstitutionally restrictive. Although disagreeing with the majority's result, I do agree that *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), does provide the standard of review in cases involving

public employment and first amendment claims. *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970); *Ruderer v. United States*, 412 F.2d 1285, 188 Ct.Cl. 456 (1969); *Brukiewa v. Police Commissioner*, 257 Md. 36, 263 A.2d 210 (1970); Grossman, *Public Employment and Free Speech: Can They Be Reconciled?*, 24 Ad.L.Rev. 109 (1972).

Since the plaintiff's first amendment rights are being infringed, the defendants have the burden of proving that the State's interest in efficiency in public service outweighs the plaintiff's interest in free speech and the interest of society in free and open debate in matters of public concern. *Pickering v. Board of Education*, 391 U.S. at 568, 573, 88 S.Ct. 1731, *see Virginia Pharmacy Bd. v. Virginia Consumer Council*, — U.S. —, 96 S.Ct. 1817, 48 L.Ed.2d 346 (decided May 24, 1976).

The defendants have failed to show that the functions of the department of resources and economic development were being substantially impeded by the plaintiff's statement. The defendants have failed to justify their contention with reasonable inferences flowing from concrete facts, but rather have merely abstractly suggested that the interests of the department were materially and substantially jeopardized. A mere tendency to impede the function of the department is not sufficient to limit the plaintiff's first amendment rights. *Abbott v. Thetford*, 529 F.2d

695 (5th Cir. 1976); *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 492 (7th Cir. 1972); *James v. Board of Education of Central Dist. No. 1*, 461 F.2d 566, 571 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491 (1972); *L. A. Teachers Union v. L. A. City Bd. of Ed.*, 71 Cal.2d 551, 78 Cal.Rptr. 723, 455 P.2d 827 (1969). It is not the content of the statement that is controlling, but rather the impact of the speech. Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering*, 59 Iowa L. Rev. 1256, 1267 (1974).

The defendants have also failed to show that plaintiff's statement impeded his performance as director of the division of economic development. *Gieringer v. Center School Dist. No. 58*, 477 F.2d 1164 (8th Cir. 1973); *Lusk v. Estes*, 361 F. Supp. 653, 655 (N.D.Tex.1973). I fail to see and defendants have failed to prove how plaintiff's single statement can cause any significant damage to the working relationship with his superiors. The citizenry's interest in information concerning the pulp mill far outweighs any possible strain in the superior-subordinate relationship. In any event, there can be no governmental interest in "preventing the sort of disharmony which inevitably results from mere expression of controversial ideas." *L. A. Teachers Union v. L. A. City Bd. of Ed.*, *supra* 71 Cal.2d at 561, 78 Cal.Rptr. at 729, 455 P.2d at 833; *Lusk v. Estes*, *supra* at 663. *Starsky v. Williams*, 353 F. Supp. 900, 923–24 (D.Ariz.1972), *modified* 512 F.2d 109 (9th Cir. 1975).

As to the impact of plaintiff's statement on the public, the defendants have failed to show that the statement resulted in an unjustifable loss of public confidence in the department of resources and economic development and caused actual damage to its integrity.

But the factor which must be of greatest weight is the existence or nonexistence of an issue of legitimate public concern. The issue of the establishment of a major pulp mill within the State of New Hampshire is of vital political, economic, and environmental concern to many of New Hampshire's citizens. As the public's concern with a matter increases, the State's interest in restricting speech correspondingly decreases. Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering*, *supra* at 1261; *Donahue v. Staunton*, 471 F.2d 475, 481 (7th Cir. 1972), *cert. denied*, 410 U.S. 955, 93 S.Ct. 1419, 35 L.Ed.2d 687 (1973); Gatti, *Teachers and the First Amendment*, 7 Willamette L.J. 435 (1971). Certainly this issue was of such legitimate public concern as to outweigh any interest the State may have had in restricting speech.

Although plaintiff can be dismissed for failing to fulfill his statutory duties, he cannot be dismissed under the guise of "insubordination" for exercising first amendment rights, particularly under the circumstances of this case where the statement involves a matter in which the public's right to know is so substantial. Dis-

missal of State employees should not be used so as to stifle the free and unhindered debate on matters of public importance, which is the core value of the free speech clause of the first amendment and part I, article 22 of the New Hampshire constitution and lies at the very foundation of our free society. *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

As I would hold that plaintiff's dismissal was in violation of his first amendment rights, I would not reach the other issues presented by this transfer.

Appendix D.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

EDWARD J. BENNETT
APPELLANT
V.
MELDRIM THOMSON, JR.
JAMES H. HAYES
LYLE E. HERSON
LEON G. YEATON
LOUIS D'ALLESANDRO
BERNARD A. STREETER, JR.
RESPONDENTS

NOTICE OF APPEAL

TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Edward J. Bennett, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the order of the New Hampshire Supreme Court dismissing his Petition for Certiorari entered herein on July 30, 1976, and the Final Order of the New Hampshire Supreme Court denying the Appellant's Motion for Rehearing entered August 31, 1976.

This appeal is taken pursuant to 28 U.S.C., § 1257 (2) (1970).

Respectfully submitted,
EDWARD J. BENNETT
By His Attorneys:
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N

By: /s/ Kimon S. Zachos
Kimon S. Zachos

I hereby certify that on the 23rd day of November, 1976, a copy of the foregoing was sent by first class mail, postage prepaid, to David A. Brock, Esq. and Joseph DiClerico, Esq., Opposing Counsel.

/s/ Kimon S. Zachos
Kimon S. Zachos

Supreme Court, U. S.
FILED
JAN 13 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-744

EDWARD J. BENNETT,
Appellant

v.

MELDRIM THOMSON, JR.
LYLE E. HERSOM
JAMES H. HAYES
LEON G. YEATON
LOUIS D'ALLESANDRO
BERNARD A. STREETER, JR.
Appellees

Appeal from the Supreme Court of
New Hampshire

MOTION TO AFFIRM

PERKINS & BROCK

By: David A. Brock
Frederick E. Upshall, Jr.

10 Green Street
Concord, New Hampshire 03301
(603) 225-2791

Attorneys for Appellees

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Supreme Court of the United States

October Term, 1976

No. 76-744

EDWARD J. BENNETT,
Appellant

v.

MELDRIM THOMSON, JR.
LYLE E. HERSOM
JAMES H. HAYES
LEON G. YEATON
LOUIS D'ALLESANDRO
BERNARD A. STREETER, JR.
Appellees

Appeal from the Supreme Court of
New Hampshire

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move that the final judgment and decree of the Supreme Court of the State of New Hampshire, as reported at 116 N.H. , 363 A.2d 187 (1976), be affirmed. The decision of the New Hampshire Supreme Court is well-grounded in fact and law and the ques-

tion presented on this appeal, in the context of this case, is not so substantial as to warrant further consideration by this Court.

JURISDICTION

The Constitutional and statutory jurisdictional predicate for this appeal is adequately set forth in Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether an unclassified state employee, appointed to his position by the Governor and Executive Council, may, after public hearing, lawfully be dismissed by the appointing authority pursuant to state law permitting dismissal "for the good of the department . . . to which he is assigned," when the employee, in the course of his employment, makes a statement contrary to the specific orders of his superior and the established policy of his department, and as a result thereof the effectiveness and efficiency of his department is adversely affected.

STATEMENT OF CASE

On June 27, 1974, Edward J. Bennett [hereinafter Appellant] was appointed Director of the Division of Economic Development within the Department of Resources and Economic Development [hereinafter DRED] by the Governor and Executive Council [hereinafter Appellees] of the State of New Hampshire. As Director he was "responsible for the administration and operation of . . . [his] division, subject to the supervisory authority of the Commissioner [of DRED, George Gilman] . . . ." N.H. RSA 12-A:3 (Supp. 1975). Further, by statute, Appellant was to "serve, subject to the provisions of RSA 4:1, for a term of

four years." The provisions of RSA 12-A:2, defining the authority and duties of the Commissioner, and RSA 12-A:3, dealing with the responsibilities of Appellant, made it absolutely clear that Appellant, in the performance of his employment, was subject to the authority and supervision of the Commissioner. Further, the departmental structure itself implies and necessitates a coordinated, co-operative and responsive relationship between the Commissioner and his divisional directors.

In December, 1974, Parsons and Whittemore Corporation, an out-of-state industrial firm, was seriously considering the possibility of locating a modern pulp mill complex within the State of New Hampshire. Pursuant to the provisions of RSA Chapter 12-A, DRED played a major role in this proposed project, encouraging and assisting the firm in the formulation of its plans. Commissioner Gilman, pursuant to his statutory authority, determined as a matter of departmental policy that DRED would make every effort to assist and encourage the company to locate in New Hampshire, subject to compliance with all federal, state and local requirements. (*Findings and Order*, set forth in App. B. of Appellant's Jurisdictional Statement at 27). Appellant was personally opposed to this policy. By memo to the Commissioner, dated February 3, 1975, he registered his vehement disapproval and in a subsequent memo dated February 13, 1975, he requested that he be excused from either an official or unofficial capacity in either advocating or defending the proposition. (App. B. at 27). Commissioner Gilman gave serious consideration to Appellant's dissent, discussing it with others in DRED, and meeting with Appellant in February, 1975. After this meeting, in view of Appellant's strong convictions, the Commissioner agreed to release Appellant from official and unofficial duties connected with the pulp mill project. (App. B. at 27-28). In addition, however, the Commissioner clearly directed Appellant to make no statements relating to his [Director Bennett's] criticism of the department's policy. Appellant

understood the meaning of the Commissioner's directions and further "realized that any public statements made by him in his official capacity adverse to the policy of the Department relative to the Parsons and Whittemore proposal would certainly be harmful to the Department." (App. B. at 28).

Appellant chose to flaunt the directions of the Commissioner and, in total disregard of his order, made the following statement regarding the pulp mill proposal while addressing the Manchester, New Hampshire Chamber of Commerce in his official capacity:

> I'll be short and sweet on that one. The official policy of the administration because Governor Thomson unilaterally announced that the pulp mill will locate in the Connecticut River Valley, his official state policy is that we are pro pulp mill and it's official department policy that we are pro pulp mill. And it's official division policy that we are pro pulp mill. But I got chewed out two weeks ago by the Governor for speaking up on snow-making at Mt. Sunapee where I opposed spending eight hundred fifty thousand dollars for putting and making snowflakes for a few skiers when we have unemployed in the State. I think it was wrong and I think it's wrong now. But he told me that he expected me to, if I was going to be on the team, that when he blew the whistle that I would be on the field on his side, so, but I'm going to get off the field for just one minute and go on the bench and say that I think that that idea of a pulp mill stinks. It contravenes everything that this State, everything that we are trying to do, that I've talked to you about, about quality, it would be a catastrophe in my judgment. Don't quote me on that. I don't think that works with the Governor.

This public statement was a blatant act of insubordination and adversly affected the effectiveness, public credibility and efficiency of DRED. (App. B. at 30-31).

As a direct result of Appellant's conduct, on July 21, 1975, pursuant to RSA 4:1 and 12-A:3, and in compliance with the ruling of the New Hampshire Supreme Court in *Opinion of the Justices,* 115 N.H. 385, 341 A.2d 758 (1975), Appellees unanimously adopted a "Resolution in the Nature of a Petition for Removal," set forth in Appendix A. of Appellant's Jurisdictional Statement. The Petition set forth generally and with particularity the grounds for requesting the removal of Appellant. Appellant was served with a copy of this Petition on July 21, 1975.

On September 25, 1975, Appellees, with an Assistant Attorney General advising them on questions relating to procedural and substantive due process and special counsel presenting evidence in support of the Petition for Removal, conducted a public hearing. Appellant was represented by counsel at this hearing and was given full opportunity to cross-examine witnesses presented against him and to call witnesses of his own. On October 21, 1975, Appellees issued their Findings and Order, accurately set forth in Appendix B. of Appellant's Jurisdictional Statement, in which the following order was entered:

> NOW, THEREFORE, in accordance with the provisions of RSA 4:1, the Governor and Council hereby order that Edward J. Bennett be and hereby is removed from the office of Director, Division of Economic Development, within the Department of Resources and Economic Development, said order to be effective forthwith.

On October 24, 1975, Appellant filed a Motion for Rehearing with Appellees which was denied on October 29, 1975.

On November 24, 1975, Appellant filed a Petition for Certiorari in the New Hampshire Supreme Court, alleging, *inter alia,* that Appellant's dismissal was in violation of the First Amendment to the Constitution of the United States of America. On July 30, 1976, the Supreme Court of the State of New Hampshire issued its opinion dismissing Appellant's petition and holding,

> The director of economic development in the furtherance of his statutory duty to attract industry to the State acts through the spoken and written word. The facts found by the Governor and Council support their conclusion that the plaintiff's remarks on July 13, 1975 [sic], were knowingly insubordinate and seriously compromised his ability to effectively carry out the responsibilities of the department. Under these circumstances, his

removal "for the good of the department of resources and development" does not violate his first amendment rights.

(App. C. at 41) (Citations omitted).

Appellant thereupon filed a Motion for Rehearing in the New Hampshire Supreme Court on August 6, 1976 which Motion was denied on August 31, 1976.

ARGUMENT

A. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT SHOULD BE AFFIRMED.

1. *Speech directly related to and within the course of one's employment made in opposition to established policy and expressed orders of an employee's superior is not within the protective scope of the First Amendment.*

In *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), this Court held that as a general rule government employees cannot be forced to relinquish First Amendment rights to which they otherwise would be entitled as citizens. *Id.* at 568, 88 S.Ct. at 1734. *See also, e.g., Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967). *Pickering* overruled the dismissal of a public school teacher based upon certain letters critical of the teacher's superiors which the teacher had written to a newspaper. It was found that the teacher's letters had no effect on his ability to effectively perform duties relating to his employment. The Court noted that in instances in which an employee exercises his First Amendment rights and those actions are not directly and substantially related to his employment status, the employee is to be given the same broad First Amendment protection afforded other members of the general public.

391 U.S. at 574, 88 S.Ct. at 1738. The ruling in *Pickering* made it equally clear that where a direct and substantial relationship between the facts of employment and the subject matter of the speech exists, an employee is not to be regarded as a member of the general populace for the purposes of the First Amendment. *Id.* In applying the legal doctrine or standard set forth in *Pickering* to Appellant's dismissal, the New Hampshire Supreme Court appropriately ruled that Appellant's speech was not within the scope of the First Amendment's protection.

Several critical distinctions exist between Appellant's conduct and the conduct of the teacher in *Pickering*. Appellant's statement was made in his official capacity, while he was addressing a public group as the Director of the Division of Economic Development. Further, his speech involved substantial matters which were directly related to the operation of the division and the performance of his duties and responsibilities as Director. As the New Hampshire Supreme Court aptly noted, Appellant's statement was made in the furtherance of his employment, and hence, "Contrary to the situation in *Pickering* 'the fact of employment' is here directly and substantially 'involved in the subject matter of the public communication made'." (App. C. at 41). In view of the existence of this direct and substantial relationship between Appellant's speech and the facts of his employment, his dismissal was totally consistent with the *Pickering* rule and in no way violated his First Amendment rights.

In addition, it is noteworthy that Appellant's speech was made *during the hours of his work*. Courts interpreting the *Pickering* holding have recognized a crucial distinction between on-the-job and off-the-job speech. *See, e.g., Phillips* v. *Adult Probation Department of the City and County of San Francisco*, 491 F.2d 951 (9th Cir. 1974); *Goldwasser* v. *Brown*, 417 F.2d 1169 (D.C. Cir. 1969). In *Phillips*, the Circuit Court of Appeals upheld the suspension of a deputy probation officer for displaying a certain wall poster in his office. As was the case in the within action, the

probation officer's conduct was in direct contravention of a specific order of his superior. In upholding the suspension the court observed, "In distinguishing *Pickering* the district court properly noted the critical distinction between expressions outside work premises during off hours and those carried on during work hours and on the work premises." 491 F.2d at 955, n.9. Appellant has cited no authority in which this Court has limited the right of a public employer to restrict the conduct or speech of an employee *while performing his duties.* The distinction noted in *Phillips* and *Goldwasser* is surely a valid one and supports the validity of Appellant's dismissal. *See generally,* Grossman, *Public Employment and Free Speech: Can They Be Reconciled?,* 24 Admin. Law Review 109 (1972).

Another crucial distinction between Appellant's conduct and the actions of the teacher in *Pickering* is the fact that Appellant was directly ordered by his superior, prior to making his speech, to avoid making any public statement on the issue involved. There can be no doubt that Commissioner Gilman, pursuant to his powers and duties set forth in RSA 12-A:2, had the statutory authority to control and direct the operations of the Division of Economic Development. Included, by necessity, within this authority is the power to demand and expect co-operation and obedience by the director and all other employees within the department. Appellant acknowledged his subordination to the Commissioner at the hearing on September 25, 1975, in which he agreed that he was "subordinate to, responsible to, and subject to the supervision of" the Commissioner. Appellant was not precluded from addressing public issues unrelated to the performance of his job, as was the case in *Pickering.* He was not precluded or inhibited from exercising his right to express a belief, unrelated to his employment, or to associate with others for the purpose of espousing that belief, as was the case in *Elrod* v. *Burns,* U.S. , 96 S.Ct. 2673 (1976), heavily relied upon by Appellant. Rather, Appellant was given a specific and

limited directive by his superior — one relating directly to the performance of his job. Admittedly this Court has ruled that broad restrictions, such as loyalty oaths, which infringe upon or chill the exercise of First Amendment rights of all employees are unconstitutional. *See, e.g., Weiman* v. *Updegraff,* 344 U.S. 183, 73 S.Ct. 215 (1952). This Court has also recognized, however, that under certain circumstances limited restrictions placed upon particular employees are not violative of the First Amendment. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960). The narrow limitation placed upon Appellant's work-related speech constitutes such a permissible restriction.

It is well settled that a public employee may lawfully be dismissed for insubordination. *See, Elrod* v. *Burns,* U.S. at , 96 S.Ct. at 2686. To rule otherwise would effectively prevent the Government, as an employer, from maintaining the discipline and cohesion necessary to promote the efficient operation of government. *See, e.g., Phillips* v. *Adult Probation Department,* 491 F.2d at 955, n.10. Director Bennett chose to disobey the order of Commissioner Gilman and to flaunt the authority of his superior. The First Amendment in no way precludes his dismissal for this act of insubordination.

2. *Dismissal of Appellant for speech which had a serious detrimental effect upon his ability to perform his statutory duties and upon the credibility and effective operation of his department did not violate Appellant's First Amendment rights.*

In *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 (1974), this Court affirmed a ruling that under certain circumstances the discharge of a public employee may be lawfully based upon the employee's speech without offending the guarantees of the First Amendment. *Id.* at 160-61, 94 S.Ct. at 1647. Quoting from *Pickering, Arnett* noted,

> At the same time it cannot be gainsaid that the State has in-

> terests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

In applying this balance test, it is essential to consider not only the validity and degree of the State's interests, but also the extent to which an employee's First Amendment rights are infringed upon. *See generally, Elrod* v. *Burns,* U.S. at , 96 S.Ct. 2673 (1976). In his Jurisdictional Statement Appellant relies heavily upon the decision of this Court in *Elrod* v. *Burns,* U.S. , 96 S.Ct. 2673 (1976). Clearly, a fact situation involving the dismissal of all employees based solely upon their political affiliation is distinguishable from the facts surrounding Appellant's dismissal. In *Elrod* the Court stressed the fundamental nature of one's right to express and support a given political view. *Id.* at , 96 S.Ct. at 2681. Further, the Court emphasized the lack of nexus between the Government's party-loyalty requirement and the employee's fulfillment of his duties. *Id.* at , 96 S.Ct. at 2683-84. The Court noted that the loyalty restriction was a *significant* impairment of employees' First Amendment rights and stated that this requirement was far more restrictive than was necessary to further the Government's interest in efficient operations. *Id.* at , 96 S.Ct. at 2684, 2687-88. The Court suggested, however, that a less restrictive requirement, such as the dismissal of all policy-making individuals based upon their party affiliation, would be valid. *Id.* In the instant case, the State placed no wide-ranging restriction on Appellant's exercise of his First Amendment rights. The "restriction" applied only to one limited subject matter, an area directly related to Appellant's employment status and the performance of his duties. Such a minor and insignificant intrusion

into Appellant's exercise of his First Amendment rights is greatly outweighed in this instance by the State's interest in providing efficient and orderly services.

Both *Arnett* and *Pickering* recognize that the First Amendment does not prevent the discharge of an employee who has made statements which impair the employee's effectiveness or impede the performance of his duties. *Pickering* stands for the proposition that government, as an employer, may lawfully discharge a person, such as Appellant in this case, if his speech impairs the faithful performance of his duties or interferes with the orderly operation of the department. 391 U.S. at 572-73, 88 S.Ct. at 1736-37. Further, the Court in *Pickering* recognized the importance to be placed upon the Government's interest in "maintaining either discipline by immediate superiors or harmony among co-workers." *Id.* at 570, 88 S.Ct. at 1735. Finally, the Court noted that where a close, day-to-day, working relationship exists between the employee and his superior, an employee's statements critical of his superior can be the basis for dismissal if they have the effect of undermining that relationship. *See, id.,* n.3.

There can be no doubt but that Appellant's actions here, in direct contravention of a specific order of his supervisor, would have a serious detrimental effect on Commissioner Gilman's ability to maintain discipline within the department. Commissioner Gilman so testified at the hearing on this matter. To argue otherwise completely ignores the role which obedience plays in maintaining discipline. To permit one employee, at will, to violate his superior's reasonable orders can have no effect other than to undercut the superior's authority and undermine discipline. *See generally, Phillips* v. *Adult Probation Department,* 491 F.2d at 955, n.10.

The effect which Appellant's statement had on the working relationship that existed between Appellant and Commissioner

Gilman also provides justification for his removal. In his Jurisdictional Statement, Appellant maintains that there was no testimony relating to the existence of the close relationship envisioned in *Pickering*. Further, he maintains that his statement is not rightfully characterized as a criticism of his superior. Such arguments simply ignore the practicalities of this matter. Implicit in the proper execution and efficient performance of duties and responsibilities under RSA 12-A:2 and 3, the statutes at issue before the Hearing Tribunal, is the existence of a constant and harmonious relationship between the Commissioner and his division heads. Without regard to the many other matters being handled by the department and division on a continuous basis, the record is replete with references to contact between the Commissioner and Appellant concerning the very policy Appellant disagreed with. Appellant had direct input to the Commissioner concerning this policy. Further, notwithstanding the provisions of RSA 12-A:2, which specifically provide that the power to establish department policy resides with the Commissioner, Appellant acknowledges that he did have "some ability to influence the formulation of policy within the Department." (Jurisdictional Statement at 15). Surely, this ability to influence policy decisions, of necessity, implies and requires Appellant's close working relationship with the Commissioner. In fact, this Court has recognized that such a close working relationship is likely to exist and necessary between policy-making employees. *See generally, Elrod* v. *Burns,* U.S. at , 96 S.Ct. at 2687-2689. In this case, Commissioner Gilman testified that he discussed the pulp mill proposal with Appellant in January, 1975, and "from that time on it was a matter of some discussion in the day-to-day operation of the Department." Given the type of departmental structure where the Commissioner and his division directors work together on a day-to-day basis, and, with each other, determine departmental policy, the close relationship alluded to in *Pickering* exists.

Appellant's argument that his criticism of the departmental policy should not be deemed criticism of the Commissioner, the one who was ultimately responsible for its formulation and implementation, defies logic. In his speech, Appellant did not stop with a mere recitation of his disagreement with the policy. Rather, he felt a need to color his opposition to the official policy with such inflammatory terms as "stinks" and "catastrophe." Appellant cannot now seriously maintain that this intemperate criticism of the very policy set forth and supported by the Commissioner is anything but open criticism of Mr. Gilman as well. *Pickering* acknowledged the serious consequences which such criticism might have on the workings of government, and thereby recognized such criticism as a valid basis for dismissal. 391 U.S. at 570, n.3, 88 S.Ct. at 1735, n.3. This Court itself noted in *Arnett* v. *Kennedy,*

> We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected as to chill . . . freedom to engage in appropriate speech.

416 U.S. at 161-62, 94 S.Ct. at 1648 (1974).

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The Federal question inherent in employee dismissal cases, such as Appellant's, has been conclusively resolved by this Court. Review of this case would be of minimal value as a precedent.

In his Jurisdictional Statement, at 21, Appellant acknowledges that the issues presented by his dismissal are governed by the principles of law set forth in *Pickering* and *Elrod*. In addition to the legal guidelines delineated in those cases, this Court

has recently addressed the issue of application of the First Amendment to public employment in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974) and *United States Civil Service Commission* v. *National Association of Letter Carriers*, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880 (1973). In *Arnett*, the Court acknowledged that the issues presented in a case such as this are not susceptible to an all-inclusive and definitive rule of law. *See generally, Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974). This Court has recognized on several occasions that the balance test set forth in *Pickering* is the applicable standard in a case such as the one at bar. *See Arnett* v. *Kennedy*, 416 U.S. 134, 96 S.Ct. 1633 (1974) and *Elrod* v. *Burns*, U.S. , 96 S.Ct. 2673 (1976). The Court has also ruled that in each such case the validity of an employee's dismissal should be determined by application of its facts to this general test. Nothing more nor less than the foregoing was undertaken by the New Hampshire Supreme Court in reaching its decision.

The underlying and substantial federal question raised by a matter of this kind has already been decided by this Court. The request for review of Appellant's dismissal does not present this Court with a substantial federal question, but rather represents a request for yet another judicial review of the application of the narrow facts of this case to a well-established principle of law. Such a review would be of little value as a precedent.

CONCLUSION

Appellees respectfully submit that based upon the foregoing argument, and in furtherance of justice, the final judgment and decree of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

Meldrim Thomson, Jr.
Lyle E. Hersom
James H. Hayes
Leon G. Yeaton
Louis D'Allesandro
Bernard A. Streeter, Jr.

By their attorneys:

PERKINS & BROCK

By /s/ David A. Brock
David A. Brock
Frederick E. Upshall, Jr.

CERTIFICATE OF SERVICE

I, Frederick E. Upshall, Jr., do hereby certify that in accordance with Rule 33 of the Rules of the Supreme Court of the United States of America, three copies of the foregoing Motion to Affirm were forwarded by first class mail, postage prepaid, to Kimon S. Zachos, opposing counsel.

/s/ Frederick E. Upshall, Jr.
Frederick E. Upshall, Jr.

Concord, New Hampshire
January 5, 1977